IN THE SUPREME COURT OF THE UNITED STATES

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TERRY L. WHITMAN, :

Petitioner :

v. : No. 04-1131

DEPARTMENT OF TRANSPORTATION, :

ET AL. :

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Washington, D.C.

Monday, December 5, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

PAMELA S. KARLAN, ESQ., Stanford, California; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Whitman v. Department of Transportation.

Ms. Karlan.

ORAL ARGUMENT OF PAMELA S. KARLAN

ON BEHALF OF THE PETITIONER

MS. KARLAN: Thank you. Mr. Chief Justice, and may it please the Court:

The Government now concedes that the Ninth Circuit erred in holding that the negotiated grievance procedure of the Civil Service Reform Act strips Federal courts of their jurisdiction to hear constitutional claims by Federal employees.

JUSTICE SCALIA: We're not bound by that concession. If that's a jurisdictional question, it doesn't matter whether the Government conceded it or not, does it?

MS. KARLAN: No. That's correct, but the Government correctly conceded perhaps I should have said.

So I think that the --

JUSTICE SCALIA: That's a different question.

MS. KARLAN: So the question before the Court is not whether, I think, Mr. Whitman can receive

constitutional judicial review, but rather, where and how he is supposed to do so.

JUSTICE SCALIA: I still think it's whether because I don't agree with the Government. Can I do that?

MS. KARLAN: Of course, you can.

JUSTICE SCALIA: So that is the question. I mean, the question is open whether there --

MS. KARLAN: Yes. I -- I think, obviously, the Court has an obligation to satisfy itself of the jurisdiction. But I'll point out then that you would have had that obligation as well in NTEU against Von Raab in which this Court addressed precisely the same kind of case, litigated in precisely the same posture.

JUSTICE KENNEDY: Was it raised? Was that objection, the jurisdictional question, raised in the briefs and --

MS. KARLAN: It was raised in the district court and the Government chose not to raise it in the court of appeals or here. But, of course, you have, as Justice Scalia said, an independent obligation to satisfy yourself of your subject matter jurisdiction.

JUSTICE SCALIA: But our cases say that where we don't speak to a jurisdictional question, it is not regarded as having been decided.

MS. KARLAN: No. I'm not saying that you decided it in NTEU against Von Raab, Justice Scalia. I'm just saying that given that you were apparently satisfied with the theory, you should be satisfied here too as well.

JUSTICE SCALIA: Even -- even if you assume that Von Raab decided it, you have a quite different situation here. The issue isn't whether there will be any judicial review. The issue is whether there will be judicial review for the minor grievances, even if they happen to involve a constitutional issue, that are -- that are not -- for which judicial review was not provided. Any major employee action -- judicial review, as I understand it, is available, and it is only relatively insignificant actions for which judicial review is not available. Isn't that right?

MS. KARLAN: No. With all respect, Justice Scalia, I think that's incorrect.

The Civil Service Reform Act provides for judicial review of personnel actions, and if you go back to the opinion for the Court that you wrote in Fausto, you'll see that you repeatedly referred to them as personnel actions there.

Now, a warrantless search of a Government employee, as this Court's opinion in Bush against Lucas

says at note 28, is not a personnel action, and therefore, there is no way of obtaining review of it through the Civil Service Reform Act. But it is not in any sense here a minor violation of Mr. Whitman's rights.

JUSTICE SCALIA: He could have refused -- he could have refused the search, in which case if there was any significant personnel action taken against him for refusing it, he would have had judicial review of whether the search was constitutional or not.

MS. KARLAN: Yes, Justice Scalia, but he would have to bet the ranch to do it. And I think --

JUSTICE SCALIA: That's often the case where -- where, in -- in order to challenge a governmental action, you -- you have to be willing to -- to go to court by resisting it.

MS. KARLAN: Justice Scalia, I think that's incorrect when it comes to Government agency actions of this kind. That's what the Abbott Laboratories case that we cite in our brief makes quite clear.

And I think last week, just last week, this Court understood precisely that problem in talking about the doctor who faces the abortion statute in Ayotte. And several members of the Court pointed out that to risk your license there or to risk, in this

case, a job that our client has held for 20 years in order to challenge whether his Fourth Amendment rights are violated is not normally how judicial review should be accomplished.

And so the question here really is how judicial review should be accomplished, and we've maintained all along that the way judicial review should be accomplished here is the way that it's accomplished in all sorts of cases, by bringing an action in the Federal district court seeking injunctive relief.

Now, what the Government --

CHIEF JUSTICE ROBERTS: Even though if -- if -- do you concede that if he had, for example, refused the testing and been fired and it was a major personnel action, he would have to go through the statutory procedures before bringing that -- the constitutional claim on review of those administrative procedures?

MS. KARLAN: Absolutely, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Well, doesn't it seem odd -- and this is sort of the logic of -- in Fausto and some of the other cases -- that when you have a major action, you have to exhaust before you can go into court, but if you have something that doesn't qualify as a major adverse action, you get to go to

court right away?

MS. KARLAN: I can see why that might seem at first a little strange to you, Your Honor. But the point of the CSRA is to deal not with major versus minor actions. It's true that minor actions you get administrative review and not judicial review, but that's about personnel actions. Mr. Whitman is not challenging a personnel action here. He's challenging a warrantless search. The warrantless search was the non-random, arbitrary urinalysis and breathalyzer to which he was subjected.

JUSTICE SCALIA: But that search was a consequence of his employment. It -- this wasn't a search of a -- of a citizen who had no connection with the Government. It was a search that he was required to submit to as an employee. So to -- to describe it as unrelated to employee actions seems to me unrealistic. The only reason he submitted to it was that if he didn't, he would have -- he would have been subject to an employee action.

MS. KARLAN: No, Justice Scalia. He was required, as a condition of his employment, to submit to constitutional drug testing. And his allegation in this case is that this drug test was unconstitutional and --

JUSTICE STEVENS: Do you think it becomes unconstitutional when -- when you have one more test? What did it become unconstitutional? The first test was not unconstitutional.

MS. KARLAN: No, Your Honor. It became unconstitutional when it became clear that at the Anchorage air traffic control facility, they were not complying with the requirements both of --

JUSTICE STEVENS: How many tests did he have?

MS. KARLAN: Well, he alleges in his complaint that he was subjected to 13 tests, and then when he complained --

JUSTICE STEVENS: Over what period of time?

MS. KARLAN: Over a period of time of approximately 5 years in which other employees were subjected to no more than one or two.

JUSTICE STEVENS: So it's maybe three -- three a year? Is that what it was?

MS. KARLAN: Yes, but he was picked --

JUSTICE STEVENS: And that's unconstitutional?

MS. KARLAN: No, Justice Stevens. His allegation is he was picked seven times in a row for random drug testing.

JUSTICE BREYER: Well, somebody will be if

it's random. If you have thousands of people, somebody will be if it is random. If there were nobody who was picked seven times, that would show it wasn't random. So, you know --

MS. KARLAN: Right, and --

JUSTICE BREYER: -- whether he has a good constitutional claim here I guess is rather doubtful, and maybe it is --

MS. KARLAN: Well, he may well not. He may well lose on his constitutional claim, Justice Breyer, and that's not the issue before this Court. The question is whether a district judge should decide, should listen to the facts and decide whether this was random or not.

I tried once to calculate what are the chances of --

JUSTICE BREYER: What are they? How many people are there? How many people are tested if you try to calculate it? How many --

MS. KARLAN: I -- I tried to do it and I couldn't do it.

JUSTICE BREYER: -- in the Federal Government?

MS. KARLAN: Well, it wouldn't --

JUSTICE BREYER: All you do is you get a bell

curve and you ask the Library of Congress and they'll do it --

MS. KARLAN: Well, right, but it would be -- I -- I know. You know, I -- it -- my calculator doesn't go that high.

JUSTICE BREYER: No. It's -- it's not hard to do.

MS. KARLAN: But it's high.

JUSTICE BREYER: But it's not hard to do. You just ask someone at Stanford. They'll do it for you.

(Laughter.)

JUSTICE BREYER: But the -- the --

MS. KARLAN: It's the undergraduates that know how to do that.

JUSTICE BREYER: All right. Regardless, this is beside the point.

I -- all right. Can I -- I just want you at some point to get to not just the constitutional question. Maybe he can go in and raise his claim. I don't know if he should have exhausted or not, et cetera.

MS. KARLAN: Right.

JUSTICE BREYER: But I find it hard, in reading this, to believe the following. Like any other

worker, I mean, normally you have a collective bargaining agreement, and the union takes up your minor things. And here, what you're saying is although if it's a major thing, like a personnel action, there's a special thing where you get in -- you know, you -- you get into court way down the road. It's very complicated. This individual, even though he classifies it as a grievance where the union is supposed to take it up and the union tells him we're not going to take it up, we don't believe in your claim, that then he can run in to a Federal judge. Now, that -- that I find surprising, and I'd like you to explain how in your theory that works.

MS. KARLAN: Yes, Justice Breyer. The problem with assuming that a union will take a claim like this to arbitration is the following. Unions generally do not take individual employee grievances to arbitration, especially if you look at this collective bargaining agreement, which requires the union to pay the cost if they lose.

Now, on a claim like this, for the very reason that you suggested earlier, it may be difficult to figure out what the facts are.

JUSTICE GINSBURG: I thought your position, Ms. Karlan, was that he doesn't even have to ask the

union. Justice Breyer is presenting a scenario where he asks the union and the union says we've got better things to do with our money.

MS. KARLAN: That's right.

JUSTICE GINSBURG: But I think your position is he doesn't have to ask at all. He can go directly into Federal court under 1331.

MS. KARLAN: That's correct. Just as, for example, the employees did in the NFFE against Weinberger case on which you sat in the court of appeals where the Government again there tried to argue there was no subject matter jurisdiction, and the court really gave that argument the back of its hand because traditionally the way that someone who wants to allege, someone who is an employee or not who wants to allege, that there -- that he's seeking injunctive relief for a constitutional violation, goes to the Federal district courts under 28 U.S.C. 1331, not to a negotiated grievance procedure that was not intended and cannot operate in the way that the Government seems to hope --

JUSTICE SOUTER: Well, why -- why can't he?

JUSTICE GINSBURG: Why not? Because my -- when I first looked at this, I thought, well, this is the kind of thing that should have been -- should have been resolved at the grievance level, shouldn't have

even have to get to arbitration if he's right. He wants a survey to see if he's being picked on. If he is, there would be redress. So it seemed like this was the kind of complaint that was best handled in that kind of procedure.

MS. KARLAN: Well, I have two somewhat different answers to your question, Justice Ginsburg. One, which I'll turn to in a moment, is about the specifics of this case, but I want to give the more general one first. And that is, that the negotiated grievance procedures that unions set up are for the benefit of employees who believe that that is the best way of seeking to resolve their complaints, and most complaints, quite honestly, will be done that way. Most people are not going to go into Federal court, especially not if all they can seek is injunctive relief and they have to pay a filing fee and it's going to take a long time to go there.

Now, Mr. Whitman had two problems that made it unlikely he was going to go through the grievance process here. The first of these problems is that the grievance process, as it sets -- as it's set out in the joint appendix, the two stages of which he has control -- and I can return in a moment to what happens after that. But the two stages at which he has control are

to talk to his supervisor and to talk to the facility manager.

When it comes to drug testing of the kind to which Mr. Whitman was subjected here, his supervisor does not have authority over that. It's done from outside the facility. So talking to his supervisor will not get him anywhere.

JUSTICE SOUTER: Yes, but that simply means that the grievance procedure is more valuable in this case than merely talking to his supervisor. And -- and the -- the issue -- maybe -- maybe we're missing it, but the issue is why isn't there a very good reason to require him to go through the grievance procedure, number one, to -- to cut down on needless Federal court actions and, number two, under the -- sort of the general policy of favoring what collective bargaining agreements negotiate.

MS. KARLAN: Well, if his union had negotiated a collective bargaining agreement that required exhaustion, then it would be appropriate to make him go through it, but they didn't do that.

JUSTICE SOUTER: No, but -- no -- no question. That would be an easier case. But why shouldn't we require an exhaustion for those two reasons and maybe others?

MS. KARLAN: Well, if I could go through the grievance process, I think you'll see why this grievance process cannot be turned into an exhaustion process without this Court, in words that Justice Ginsburg used last week, inserting a lot of carets into the statute.

That is, there are two stages of this grievance process over which Mr. Whitman has control. He can go to his -- his supervisor in an informal conversation. There will be no fact finding. There is no right to call witnesses. There is no right to present evidence.

If he doesn't like that -- and he has only 15 days to do it -- he can then appeal to the -- to the supervisor of the facility. Again, he has no right to present evidence. He has no right to any kind of fact finding. He has no right to a reasoned decision. Those are the --

JUSTICE SOUTER: He may not have any right to it, but in fact, he may get some relief.

MS. KARLAN: Well --

JUSTICE SOUTER: The union may say, okay, we're going to take this one on.

MS. KARLAN: They may and I'll turn to that in just a moment, but let me add one more thing to the

answer I was giving a moment ago to Justice Ginsburg, which is one of the problems here is that our client alleges in his supplemental complaint that when he first complained about this, he was singled out yet again for retaliatory testing. And so this is precisely the kind of case in which someone who is being subjected repeatedly to retaliatory tests would be worried.

Now let me turn to the question of --

JUSTICE O'CONNOR: Well, Ms. Karlan, let me put one other element in here. Was -- was your client specifically told by the FLRA to bring a grievance under the collective bargaining agreement?

MS. KARLAN: He was -- he wasn't told. He was advised by someone who said the FLRA has no jurisdiction here because this isn't an unfair labor practice. Now, of course, what the Government wants him to do is to exhaust by going back to the FLRA which has already told him that it has no expertise on this matter.

So let me turn to that third stage of the grievance process now, which is now he invokes arbitration, or at least he asks his union to because under section 7121(b)(1)(C)(iii) of the statute, only the union can invoke arbitration. Now, this Court

noted, as long ago as Vaca against Sipes, that unions invoke arbitration in only a minuscule handful of cases, so that in Vaca against Sipes, it was 1 out of 900.

There was a recent study, the most recent study I could find that was published, about Federal Government employees that were civilian employees of the Army, and it looked at how often did the 31 different unions that represent civilian employees of the Army actually invoke arbitration vis-a-vis the number of grievances that were filed. And it found that in the years it looked at, no more than 6 percent got arbitration.

JUSTICE BREYER: Well, why isn't the thing to do here -- I -- I see that you are raising a significant question in respect to -- at least in my view, in respect to the -- an action that violates a regulation that violates a statute. Leave the Constitution aside, but it might violate a number of practices, good practices, et cetera. But why isn't focusing on that the thing for the plaintiff here to do if he goes to the union -- I'm just reading from page 6 and 7 of your brief -- and he says, I would like you to invoke arbitration? And they might do it. Now, if they do it and it comes out in a way they don't like,

he then -- they might file exceptions and they might win.

But what you're worried about is if they don't win or if they don't do it, they can go to court only if it involved an unfair labor practice or a major adverse personnel action. That's what's worrying you, I take it.

MS. KARLAN: Yes, Your Honor.

JUSTICE BREYER: Well, why isn't it, at that stage if he doesn't get into court, you then say that that isn't true? They should be able to come to court in other instances as well, making the same kinds of arguments that you're making now.

MS. KARLAN: Well, there are two reasons for that I think.

One is he suffers an irreparable bet-the-farm injury every time he's searched unconstitutionally.

The second is that the statute simply doesn't say that. I can understand -- honestly, I can -- why this Court is in favor of exhaustion requirements. And if the statute contained one, it would be eminently sensible for you to apply it.

JUSTICE BREYER: You -- you -- I -- I believe that there are millions of instances, perhaps. Now, I'm -- when I think something like this, I'm quite

often wrong. But I thought that the reason that exhaustion is required is not always because statutes require it. It's partly because of the word final in the APA, which applies here as well, and it's also because of the common law of administrative law that requires people to exhaust their remedies.

MS. KARLAN: Absolutely, and I think if you used this Court's opinion in Madigan against McCarthy as your template for thinking about whether to impose an exhaustion requirement here, because I think, quite frankly, that's what you would be doing -- you would be imposing one that doesn't exist now.

JUSTICE SOUTER: Well, but the -- the --

MS. KARLAN: The Court --

JUSTICE SOUTER: -- the whole right to -- to go into court with a constitutional claim is absent from the statute. And -- and so we may as well get hung for a sheep as a lamb. If -- if we're going to recognize the one, I don't see that we're going too much further in -- in saying it's got to be conditional on the other.

MS. KARLAN: I -- I don't think so, Justice Souter, because I think this Court has traditionally allowed individuals who are bringing constitutional claims for injunctive relief to seek that relief.

Nothing in the CSRA changed that, and if I can explain why for just a moment, I think it'll be helpful.

If you look at this Court's opinion in Fausto or you look at this Court's opinion in Bush against Lucas or the opinion in Karahalios, which I think are the three leading cases from this Court construing the Civil Service Reform Act in -- in this kind of fashion, you'll notice that they repeatedly referred to those acts as being comprehensive with regard to personnel actions.

Personnel actions is not a casual phrase. It is a defined term in the CSRA. It's defined in section 2302(a), which is -- was discussed in the Government's brief at page 5, note 5. And you will notice there, if you read it, that they do include -- indeed, Congress in 1994 amended the statute to add to the list of personnel actions orders for psychiatric testing. There was nothing here that turns a drug test into a personnel action.

Now, the CSRA is absolutely comprehensive in its field, but its field is personnel actions. And this case is not a personnel action.

JUSTICE KENNEDY: But the grievance procedure covers it, and you took pains to point out to us that when you go to the grievance procedure, you're not

necessarily entitled to findings and -- and written conclusions, et cetera. But there's a reason for that. The reason for that is that these things can be very, very minor. So now you're saying that just because the -- the grievance procedure doesn't entitle you necessarily to findings, et cetera, that you can go into court. But the only reason you don't get those findings is because we know, going in, that they're so minor. So now the most minor things go to court. That seems very anomalous.

MS. KARLAN: Justice Kennedy, all sorts of personnel actions might be minor and they might be the kind of thing that the CSRA wants to have decided administratively only or through exhaustion. This is a Fourth Amendment violation. It is not minor. As this Court held in Von Raab, the only thing that makes this kind of test constitutional --

JUSTICE STEVENS: I have to interrupt you. What is the Fourth Amendment violation?

MS. KARLAN: The Fourth Amendment violation here is this Court said that warrantless, suspicionless drug testing of Federal employees is acceptable only if it has safeguards that ensure that there is no discretion exercised in the field and that it's truly random.

JUSTICE STEVENS: As I understand, the allegations are that there was random procedure in effect, and he thinks maybe he's been tested more frequently than some other people. That's all.

MS. KARLAN: No, Your Honor. He alleges that they are not, in fact, following the random procedures, that instead, when it's more convenient for them to test him -- and I can understand why they want to test him. Every time they test him he passes the test. So why not ask Mr. Whitman who is a compliant, sober employee, if you need another person to just round out the numbers to --

JUSTICE STEVENS: Well, but as I understand it, the -- the system as a whole is not challenged as violating the Fourth Amendment.

MS. KARLAN: No. The operation of the system, as it applies to Mr. Whitman in Anchorage.

JUSTICE STEVENS: By having him take more tests than would be produced by a purely random selection.

MS. KARLAN: That's correct. And then by retaliating --

JUSTICE STEVENS: Have we ever said that's a Fourth Amendment violation?

MS. KARLAN: Of course, it is because you

can't conduct a random --

JUSTICE STEVENS: If the computer malfunctions, that's a Fourth Amendment violation?

MS. KARLAN: No. And if the Government -- the Government in its answer in the district court does not say there was a computer malfunction. They say we don't really even keep records back as long as he --

JUSTICE STEVENS: But the relief that he requested was to do a little more testing to see whether he was being tested more than the average person, as I understand it.

MS. KARLAN: Well -- well, yes. Of course, he was proceeding pro se in the district court.

JUSTICE STEVENS: Which is not -- did not seem to me to be alleging a violation of the Fourth Amendment.

MS. KARLAN: No. He -- he did. He said it is not random, and then in his supplemental complaint, he alleged that he was retaliated against for complaining the first time around and was selected out when he wasn't on the list to be tested yet again.

JUSTICE SCALIA: Ms. -- Ms. Karlan, if this is indeed serious, are you sure that it's not a personnel action?

MS. KARLAN: Yes.

JUSTICE SCALIA: There is a residual category in the definition of personnel action which says, any other significant change in duties, responsibilities, or working conditions. That's the residual category.

But one of the specifically named categories, before you get to that, is a decision to order psychiatric testing. Now, if that kind of a decision could be a personnel action, why couldn't a decision to conduct -- to conduct a drug test be considered a personnel action?

MS. KARLAN: Well, two answers to that. One is the fact that Congress -- in 1978 they first gave the entire list of personnel actions. In 1994, they amended that list to add psychiatric testing. This is after the Government has already been engaged in urine testing of Federal employees. If they wanted to say drug testing, they would have said it. And for you to add that is really --

JUSTICE SCALIA: I'm not adding it. There's a residual category at the end: or any other significant change in duties, responsibilities, or working conditions. I consider this -- you consider it a significant change in working conditions.

MS. KARLAN: With all respect --

JUSTICE SCALIA: And he thought he didn't

have to undergo drug testing, and what do you know? He's being picked on for drug testing all the time.

MS. KARLAN: Well, with all respect, Your Honor, I think you would have to overrule the Fort Stewart School against FLRA case that the Court decided in 1990 to define working conditions to include a drug test because there -- and it's cited at page 28 of the NTEU's brief -- the Court says that the term, working conditions, refers to, quote, circumstances or states of affairs attendant to one's performance of a job.

Now, drug testing is not attendant to his performance of his job. It is the condition of his holding the job in some sense that he pass the test. And if he failed that test, he would, indeed, have to go through the CSRA. But because he passed the test, he has no way of getting into court.

Now, if I could turn --

JUSTICE SCALIA: Why then would a decision to order psychiatric testing qualify? Because it says, or any other. Right?

MS. KARLAN: That's --

JUSTICE SCALIA: Significant change in duties, responsibilities, or working conditions. The implication is that a decision to order psychiatric testing is a significant change in duties,

responsibilities, or -- or working conditions.

MS. KARLAN: But if the -- but if Congress, Justice Scalia, had thought that that catchall phrase covered psychiatric tests, it would not have amended the statute in 1994 to add them specifically.

JUSTICE SCALIA: It's always good to be safe.

MS. KARLAN: Well, yes, and it's good for the FAA to comply with the Constitution. And that's why we think he should be allowed to go to Federal court.

CHIEF JUSTICE ROBERTS: Ms. -- Ms. Karlan, you have a -- a statutory claim that essentially mirrors the constitutional claim. The statute requires the testing to be random and impartial. If we think there's a difference between the constitutional claims and statutory claims with respect to their treatment under the CSRA, how do you handle that? Does he have to exhaust the statutory claim but not the constitutional one?

MS. KARLAN: I don't think that there would be a difference with respect to exhaustion on those two claims. The Government simply says he can never get review of the statutory claim. So I don't think anyone here is arguing that there should be a differential treatment with respect to exhaustion. It's with respect to whether you can get into court --

JUSTICE SCALIA: And you -- you agree with the Government on that, that he can never get review of the statutory claim.

MS. KARLAN: Oh, no.

JUSTICE SCALIA: Oh, well.

MS. KARLAN: We spend rather a bit of time in our brief explaining --

JUSTICE SCALIA: Well, don't -- don't appeal to them on a -- on a point on which you don't agree with them. I mean --

MS. KARLAN: What can I -- what can I say?

CHIEF JUSTICE ROBERTS: I still don't understand how they proceed. Does he have to bring -- can he go right into court on the constitutional claim even if the statutory claim has to go through the grievance procedure?

MS. KARLAN: The answer to that would be yes. He might end up being precluded, if he lost in Federal court on the constitutional claim, from coming back on the statutory claim.

CHIEF JUSTICE ROBERTS: So the identical claims have to proceed under two different routes.

MS. KARLAN: No, Your Honor. We don't think there is exhaustion required with respect to either set of claims.

If I may, I'll reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE RESPONDENTS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

Although Congress has not clearly expressed an intent to foreclose all judicial review of petitioner's constitutional claim, such review should be conducted in a manner that is as consistent as possible with the text and structure of the CSRA. Because petitioner failed to invoke the grievance procedures of the applicable collective bargaining agreement, his suit was properly dismissed.

And if I may, just in a -- a moment or two, summarize the Government's position as to the steps that an individual in petitioner's position would have to take in order to obtain judicial review of a constitutional claim like this one.

First, the employee must make all reasonable efforts to utilize the available administrative remedies under the CSRA itself, including any applicable collective bargaining agreement. So in this

instance, the first two steps of the grievance process, talking to the immediate supervisor and then to the facility manager, would have been within petitioner's control. And if those steps had proven unavailing, petitioner should have requested that the union take the case to arbitration, and then, if necessary, to the FLRA.

Second, if at the end of the administrative process an avenue of judicial review is available under the CSRA itself, the employee must seek relief pursuant to that provision.

And I think petitioner really concedes that point to be true; that is, if petitioner were raising a constitutional challenge to a major adverse action, such as dismissal, petitioner concedes not only that he would have been required to exhaust administrative remedies by -- by appealing to the Merit Systems Protection Board, but petitioner also concedes that we -- he would have had to seek judicial review in the manner specified by the CSRA, that is, by filing a petition for review of the MSPB's decision in the Federal Circuit, rather than proceeding directly to district court.

And finally, our position is that if at the conclusion of the administrative process, judicial

review is unavailable under the CSRA, the employee may then obtain review of his constitutional challenge alone in district court, pursuant to the Administrative Procedure -- Procedure Act.

Now, in some sense, there is an element of untidiness in our position because what we're trying to do is reconcile Congress' intent to adopt --

JUSTICE STEVENS: Mr. Stewart, can I just ask one question? Because I didn't quite follow it. I thought you were describing a major personnel action in -- in your description of the administrative review. But if this is a minor or whatever, a lesser review, would there have been an avenue through the administrative agency?

MR. STEWART: There would have been, at least for this employee, by virtue of the fact that he was covered by a collective bargaining agreement.

JUSTICE STEVENS: Through the collective bargaining --

MR. STEWART: Yes.

JUSTICE STEVENS: But then supposing the union is unwilling to grieve or take it up or he fails, then what happens?

MR. STEWART: If -- if he requests that the union take the grievance to arbitration and then to the

FLRA and the union refuses, our position would be that he could then file suit in Federal district court under the Administrative Procedure Act on his constitutional challenge alone. That is, we think on the one --

JUSTICE STEVENS: And it would be in the district court.

MR. STEWART: That would be in the district court --

JUSTICE O'CONNOR: Now, that is if -- if the union doesn't agree to arbitration?

MR. STEWART: That is if the union does not agree to take the case to arbitration and then to the FLRA. If --

JUSTICE GINSBURG: So your difference -- what's separating you and Whitman, it seems, is a question of timing. The action that you're describing that would come at the end, after he's used the administrative process, is the same one that he is seeking to bring at the front end. That is, it's a 1331 action --

MR. STEWART: I think --

JUSTICE GINSBURG: -- and -- and it's based on the Government's waiver of sovereign immunity for nonmonetary claims.

MR. STEWART: It is in part one of timing,

but it's not one of timing alone. That is, our position is if Mr. Whitman had been successful in prevailing upon the union to take the case to arbitration and then to the FLRA, the position we've taken in the brief is that judicial review, if the FLRA had rendered an unfavorable decision, would most appropriately be accomplished in the court of appeals pursuant to the CSRA.

But our position is if the union is unwilling to take the grievance to the point where the ruling can be reviewed under the provisions of the CSRA itself, that the APA remains available as a fall-back.

But the -- the fact that it's one of timing doesn't make it an insignificant difference. That is --

JUSTICE SCALIA: Mr. Stewart, you know, you have here a statute in which Congress, with malice aforethought, very clearly provides for judicial review of any major personnel actions and does not provide for judicial review of what it had regarded as insignificant personnel actions. I can understand the position, although I don't agree with it, that the constitutional provision which says Congress can -- can make exceptions to the jurisdiction of the Federal courts should not be interpreted to exclude significant

constitutional claims. But when Congress has gone to the trouble of providing for judicial review of any claims that are significant and just saying any other insignificant action, even though a constitutional violation is alleged in connection with it, if in fact it does not harm you that much, we're not going to allow judicial review, what is -- what is wrong with that? It seems to me that's what Congress has said and -- and you're creating a scheme that simply contradicts what Congress plainly said.

MR. STEWART: I mean, first, certainly if Congress had said with absolute clarity that district court review of claims like this is precluded, we would defend the statute as constitutional.

Second, I agree with you that the fairest reading, the most likely interpretation of Congress' intent is that claims of this nature -- that is, complaints about aspects of the employment relationship that don't rise to the level of personnel actions. The fairest reading of Congress' intent is that such suits would be precluded.

However, this Court in a number of prior decisions has required something more than that before inferring that Congress has barred all judicial review of a colorable constitutional claim.

JUSTICE SCALIA: Did any of them involve a situation in which Congress took the pain to separate significant actions from insignificant actions?

MR. STEWART: I mean, in some sense the CSRA --

JUSTICE SCALIA: I mean, some of them involve deportation and, you know, major -- major actions. This is a case where Congress has -- has carefully tried to say these are major actions for which you should be able to get into the courts. And these other things -- you -- you have these administrative remedies, but that's the end of it.

MR. STEWART: But I -- I think the flip side of it is that some of those cases involved statutes that appeared on their face to function as express preclusions of judicial review. Here, we don't have that. Here, the argument as to why Administrative Procedure Act review is precluded is not based on the text of any CSRA provision standing alone. It's based --

JUSTICE KENNEDY: But I'm -- I'm not sure what the congressional intent would be to bifurcate the constitutional and the statutory claims, especially if they're the same thing.

MR. STEWART: I don't know that there was

necessarily an intent to bifurcate, but I think we had the same --

JUSTICE KENNEDY: Well, that's what -- that's what you're asking us to say.

MR. STEWART: I think the Court had the same situation in Webster v. Doe. That is, in Webster v. Doe, the Court concluded that given the limits on review of the CIA director's employment decisions and given the great sensitivity of hiring and firing matters within that agency, the Court concluded that there was simply no law to apply in review of the -- the claimant's complaint under the Administrative Procedure Act. Nevertheless, the Court concluded that judicial review of the constitutional challenge remained available.

And the idea was not so much that Congress itself had manifested an intent to differentiate between the two types of claims. It was that Congress had treated the two types of claims the same but that the type of evidence that will suffice to eliminate judicial review of a non-constitutional claim is -- it's less demanding than the type that the Court would require before eliminating judicial review of a constitutional claim.

JUSTICE KENNEDY: But if -- if -- under --

under your explanation of how the system works, you go to district court with a constitutional claim. He's -- he -- the district court doesn't have to reach the statutory claim first?

MR. STEWART: No. The statutory claim wouldn't be before the district court. Again, if -- if the --

JUSTICE KENNEDY: Well, that's what I mean. This is a very odd system where you have to immediately go to the constitutional claim and you're foreclosed from looking at the statutory claim.

MR. STEWART: I -- I agree that it's an unusual system, but I think it -- and in a sense the same situation would have been present in Webster v. Doe, that is, the Court, when it came to review the merits of the constitutional challenge, wouldn't have had any possibility of deciding the case on a non-constitutional basis because non-constitutional challenges would be foreclosed.

Now --

JUSTICE GINSBURG: I thought your position on the statute was that it doesn't afford a right of action, that it was just an instruction to the Secretary. Maybe I misread your position on the statute. We're talking about 45-1048?

MR. STEWART: Yes.

JUSTICE GINSBURG: I thought that the Government's position was there's no right of action under that statute.

MR. STEWART: There's no private right of action conferred by 45-108 itself. Now, in the ordinary case, when a Federal statute places limits on agency personnel and a particular category of plaintiffs falls within the zone of interest that was intended to be protected by that provision, then even if the statute that limits agency discretion itself doesn't provide a private right of action, the Administrative Procedure Act would entitle a claimant to get into court and argue that the agency's decision was contrary to law, namely the relevant statute. So if there were no question of CSRA conclusion, we would agree that the claimant could go into court raising a statutory challenge notwithstanding the absence of a private right of action in 45-108 itself.

Here, we think that the evidence from the comprehensive congressional scheme is sufficient to divest the courts of jurisdiction over the statutory claim. We don't think that Congress has spoken with the clarity that this Court has required to divest the courts of jurisdiction over the constitutional

challenge.

JUSTICE O'CONNOR: Now, as to that, if -- if there were a petitioner with some constitutional claim -- let's not get into the debate about significant or non- significant -- covered by the collective bargaining agreement, you say the petitioner can't go to court with the constitutional claim unless he first persuades the union to seek arbitration.

MR. STEWART: No. We're saying that he first has to attempt to persuade the union to seek arbitration. That is, he has to make all reasonable efforts to utilize the full range of administrative remedies. But it -- our -- our position is if the union declines that request, then judicial review would be available at the end of the day in Federal district court.

JUSTICE O'CONNOR: All right. Now, did you raise the exhaustion claim? Did the Government raise it in the lower courts?

MR. STEWART: We didn't characterize it as an exhaustion argument. That is, the district court alluded to the petitioner's failure to exhaust in dismissing the suit. However, we -- this is not a case in which we have, up to this point, litigated the merits of the Fourth Amendment dispute and then

switched to a threshold objection to adjudication. We've always argued that the suit was barred by the CSRA scheme, and we've always pointed out that the petitioner did not take advantage of the administrative remedies that were available to him.

Really, the only change in our position is that we have been in the -- in this Court have been willing to acknowledge that in the hypothetical case where someone in petitioner's position did make -- take full advantage or make reasonable efforts to take full advantage of the administrative processes, that judicial review would be available.

JUSTICE BREYER: All right. So I guess you're saying, as to the constitutional claim, it's obvious they have to exhaust.

There's no reason why they don't have to exhaust in respect to the 12th test, which has already occurred, and in respect to the 15th, which might be threatened, if it does come about that it's threatened, they can go in, I guess, under 705 of the APA and ask for an injunction. Any reason they couldn't do that?

MR. STEWART: Well, they would first have to get into court first. They would first --

JUSTICE BREYER: No, no. What they do is they follow, like any other agency action. An agency

action has taken place. I think it's unconstitutional or you do. We exhaust our remedies and then get to court at the end of the day and make our claim.

An agency action is threatened. I am threatened with irreparable injury. I can go to court, I think, at the time it's threatened, and say I want a protective order. I think 705 provides for that specifically. And -- and, therefore, I'm protected. I can't imagine why they couldn't do that if they have a -- not just a plausible, but a -- a good claim that it does violate the Constitution and they need the protection. Is there any reason they couldn't?

MR. STEWART: I -- I mean, again with the caveat they would first have to avail themselves of the administrative --

JUSTICE BREYER: No, they wouldn't. Their point is that the very -- availing myself of the administrative remedy will work irreparable harm of -- in violation of my constitutional right. Now, maybe that's not true, but let's imagine it's true. Then couldn't they go in and ask for a protective order? I thought that you could do that, but I might be wrong.

MR. STEWART: I mean, I think you're -- you're correct that you could do that in the general run of cases under the administrative --

JUSTICE BREYER: Yes. And is there any reason that they shouldn't be able to do that here? Because they are going to say that -- I don't know they ever can make it out in this case, but they are going to say that my having to go ahead with the number -- test number 15, which, by the way, may never be threatened, but if it is, it will, the very fact that I have to do it, violate an important constitutional right that I need to have protected before undergoing the text -- the test.

MR. STEWART: No. In -- in our view, in harmonizing the -- the principle that judicial review --

JUSTICE BREYER: Yes.

MR. STEWART: -- will ordinarily be available for a constitutional claim with the remedial scheme established by the CSRA --

JUSTICE BREYER: You think they could not do that under 705. So there is a difference between you on that.

As to the statutory claim, I mean, I find -- but others may disagree with this. It's my personal view that the notion of private right of action in this area simply mixes things up. It's apples and oranges. It has nothing to do with anything. That if a person,

in fact, is adversely affected or aggrieved by a Government action, he usually, almost always, indeed, can get judicial review eventually. But what you're saying there I take it is that may be so, but this impliedly says no.

MR. STEWART: That's correct.

JUSTICE BREYER: Now, my question is do we have to decide that. Because, after all, this individual may get relief through the statutory procedures that you admit are provided by asking for grievance arbitration. He may, the first time he asks for it, be given a piece of paper that shows him he wasn't hurt. Or he may have been hurt, and they'll say we don't it again. There are a lot of things that can happen.

Do we have to decide the issue today of whether if he goes to the union, the union says we won't arbitrate, or they say we will and they lose and it isn't as an unfair labor practice -- do we have to decide that issue as to whether a person in those circumstances can then subsequently go into court?

MR. STEWART: No. I think you could certainly decide the case on the ground that an individual who has made no effort to utilize the grievance procedures that are available under the

collective bargaining agreement, can't bypass those procedures entirely by filing suit into -- in Federal district court. And it wouldn't be necessary for the Court to resolve --

JUSTICE BREYER: So we have to say the easier matter is it's clear that as to such matters, you must exhaust. It's so clear that there is no reason for us to decide whether there is an implied repeal of the right at the end of some days to -- to judicial review, a matter which is disfavored in the law.

MR. STEWART: Well, certainly to -- I mean, that is, justifiably to impose an exhaustion requirement, the Court would have to find that the -- the exhaustion principle is in some sense implicit in the CSRA.

JUSTICE BREYER: All right. My -- so I don't know why it wouldn't be.

MR. STEWART: And I think if there's ample basis for the Court to do that -- that is, one of the noteworthy features of the CSRA is that the act authorizes judicial review of a wide category of Government actions in different courts under different circumstances. But there's no provision of the CSRA that ever gives a plaintiff a right of immediate access to a Federal district court. That is --

JUSTICE O'CONNOR: Well, is -- is -- should it be a little bit of a concern to us that the lower court didn't address it? Should it be sent back to look at this exhaustion notion?

MR. STEWART: I mean, I think it's clear -- it -- it is clear and undisputed that the plaintiff was advised by the FLRA that the grievance procedure was his available remedy and declined to invoke even the initial step of the grievance procedure, and therefore --

JUSTICE GINSBURG: But that was on the view that it was an exclusive remedy. The -- the statute is not written in -- in any way as an exhaustion requirement. It says you've got a minor grievance -- issue. You go through the grievance procedure. There is no judicial review at the end of the line. So you would be converting something that Congress wrote to be an exclusive remedy into an exhaustion requirement.

MR. STEWART: But I think -- I think that's why I said earlier that there was some element of untidiness to our position. That is, we're not contending that this was precisely the scheme that Congress envisioned.

But our -- our -- the Court's task, I believe, is to reconcile Congress' apparent intent --

attempt to construct a comprehensive scheme that --

JUSTICE O'CONNOR: So you -- you have picked one way to do that. You say go through the grievance procedure. If there's a constitutional question remaining, if you haven't been satisfied, then you bring the action in court.

Another way to say is, well, as long as we're making this up, why not allow the -- the action to proceed at once in court, but then the court to say, I'm going to abstain while you go through the grievance procedure.

MR. STEWART: I -- I mean, we would -- we would resist the notion that we're making it all up. That is, whenever Congress -- whenever this Court attempts to harmonize two distinct statutes to make them -- in order that they would make sense taken together, the result is likely to be that neither statute will be read in precisely --

JUSTICE GINSBURG: Yes, I --

JUSTICE SCALIA: What's the second statute? There's no second statute here. There -- there is your concession of the fact that there has to be judicial review. That's what's driving all of this. And -- and generally speaking, when we find something to be unconstitutional, we don't rewrite a statute so that it

will be constitutional. We just say, you know, there has to be judicial review.

MR. STEWART: There is a -- a second statute, and it's the Administrative Procedure Act, which would generally allow an individual who is aggrieved by a Federal Government action to file suit in Court. And the question is whether Congress has manifested with sufficient clarity its intent to divest the court of jurisdiction under the --

JUSTICE STEVENS: Mr. Stewart, if you assume the APA is the remedy -- we're talking about a district court procedure -- how would you describe the final agency action that would be challenged in that lawsuit?

MR. STEWART: I mean, it really depends upon the extent to which -- it really depends on where the administrative procedures go. That is, the APA is --

JUSTICE STEVENS: Let's assume that the -- he seeks a grievance, and the union refuses to grieve. And then he then goes into -- into district court under the APA. What would the final agency action be in your view?

MR. STEWART: The final -- it's -- it's a little bit hard to define. It would in some sense be --

JUSTICE STEVENS: Very hard to define.

MR. STEWART: It -- it would in some sense be the allegedly unconstitutional drug test that he's already been required to take.

One of the things that makes this --

JUSTICE STEVENS: So what would his relief be? He can untake it.

MR. STEWART: Exactly. And one -- one of the --

JUSTICE STEVENS: Because he can't damages under the APA.

MR. STEWART: One of the things that makes this tricky is that under this Court's decision of City of Los Angeles v. Lyons, if an individual is subjected to allegedly unconstitutional conduct but has no reason to believe that it will happen to him again and damages are unavailable, then the -- there is no standing to seek injunctive --

JUSTICE GINSBURG: But -- but here, that's not this case because he said, when I complained, they did it again.

MR. STEWART: That's right. And I think in a sense what you could say is the -- the agency action that he would be complaining about in the APA suit is not so much the past drug test, it would be the threatened or ostensibly threatened drug test. And his

basis for believing that they were, in fact, likely to occur is that he had been subjected to unconstitutional drug tests in the past.

JUSTICE STEVENS: But that's not a final agency action. The threat of another test isn't a final agency action, is it?

MR. STEWART: I would certainly think that if -- if there were no question of CSRA preclusion, if we were just looking at the APA standing alone, and an individual said they've done this unconstitutional thing to me time after time, my supervisor has ransacked my office time and again or FBI agents have shown up at my door every day and have insisted on searching, I think even if damages were unavailable for the prior unlawful actions, at some point we would say the likelihood of repetition is sufficiently imminent that a right of action should be available in court.

And -- but again, I think all of these are perhaps potential alternative bases on which this complaint could have been dismissed, but it doesn't alter the fact that an adequate basis for dismissal was the failure to invoke the grievance procedures available under the CSRA and the collective bargaining agreement.

And I think it's not simply a -- to say that

it's simply a question of when the individual can file suit is to presuppose that the grievance procedures won't work. And there's no reason to assume that that will happen. That is, Congress manifested -- Congress in the CSRA enacted congressional findings to the effect that collective bargaining and -- and union activity in the public sector are in the public interest. It specifically required that collective bargaining agreements under the CSRA should contain grievance procedures for the resolution of disputes, and I think --

JUSTICE O'CONNOR: If the dispute were to go to arbitration -- there are very limited provisions for judicial review in the event there is a decision -- could the constitutional claim still go to court?

MR. STEWART: The constitutional claim could go to court, and what -- what we've sketched out in the brief is two alternative routes for judicial review in the event that the grievance was processed to its conclusion, that is, a finding by the FLRA.

On the one hand, it would be possible to invoke the provision of the CSRA that specifically refers to judicial review of FLRA decisions generally, and that provides for review either in the regional courts of appeals or in the D.C. Circuit.

However, it -- there is a difficulty with the statutory language in the sense that that provision that authorizes court of appeals review specifically excludes FLRA decisions on grievances. And therefore, if the Court felt like that sort of tweaking of the statutory language was just too much to tolerate, then the available remedy would be in the Federal district court.

JUSTICE GINSBURG: Am I right that the statute as written says you don't have any judicial review for these kinds of actions? You go through the grievance procedure, win or lose. That's it. There is no judicial review.

MR. STEWART: It doesn't say you have no judicial review. It -- the -- the provision that would otherwise authorize judicial review in the courts of appeals of FLRA actions is made inapplicable to grievance procedures.

JUSTICE GINSBURG: The statute does not provide for judicial review --

MR. STEWART: Exactly, but the --

JUSTICE GINSBURG: -- as it does in the case of major actions.

MR. STEWART: But the statute -- the CSRA does not say -- does not purport to divest the courts

of the authority that they would otherwise have under different statutes to adjudicate challenges to employment decisions. Now --

JUSTICE SCALIA: Mr. Stewart, if -- if we're going to tweak the statute, isn't the least possible tweak -- and perhaps not a tweak at all -- simply to consider this a personnel action?

MR. STEWART: If the Court --

JUSTICE SCALIA: If -- if a decision to order psychiatric testing can be one, why can't a decision to require drug testing be one?

MR. STEWART: That -- that would be a possible tweak. I'm not sure if it would --

JUSTICE SCALIA: I'm not sure it's a tweak at all. It -- it just depends on -- on what you consider to be working conditions. And in -- in many contexts, we've given the broadest possible interpretation to working conditions.

MR. STEWART: I think that would be a basis for dismissal in this case. I was going to say I'm not sure whether that would solve the problem from petitioner's standpoint because --

CHIEF JUSTICE ROBERTS: Well, it would mean you don't get into court at all then. Right?

MR. STEWART: It would -- the -- the remedy

for a -- an alleged prohibited personnel practice -- and, I think, an unconstitutional personnel action would be a prohibited personnel practice under the statute. The remedy for that is to complain to the Office of Special Counsel. Now, if the Office of Special Counsel seeks corrective action with the Merit Systems Protection Board and the MSPB issues a decision unfavorable to the employee, then the employee, under the terms of the CSRA itself, can seek judicial review of the MSPB's decision in the Federal Circuit. So there would be a potential route --

CHIEF JUSTICE ROBERTS: Even in the -- even if it's not a major personnel action?

MR. STEWART: Yes, if -- again, if the OSC asked for a corrective action in the MSPB. Now, if the OSC processes the complaint and concludes either that the factual allegations are unsubstantiated or that the allegations, even if true, wouldn't constitute a prohibited personnel practice and terminates the investigation on that basis, there's no avenue for judicial review under the terms of the CSRA of the -- the OSC's decision to dismiss the complaint. So I think that the -- the route you've sketched out might, at the end of the day, lead to judicial review without any tweaking of the statute. But if the OSC dismissed

the complaint, we would still be left with the problem of --

JUSTICE BREYER: What their brief says is that they can go on a personnel, as opposed to major personnel, to the OSC if, and only if, the complaint has to do with whistleblowing.

MR. STEWART: That's correct. And that -- that's --

JUSTICE BREYER: And this doesn't have to do with whistleblowing.

MR. STEWART: That -- that's correct.

JUSTICE BREYER: And therefore, even if this were a personnel action, that route to the OSC is not open to them.

MR. STEWART: That -- that is the position that they've taken in the brief. The position of the --

JUSTICE BREYER: Is that true?

MR. STEWART: -- the position of the OSC and the Department of Justice is that OSC's jurisdiction over FAA employees is not limited to whistleblower complaints.

Now -- now, it's clear that in the run of complaints, with respect to employees of other Federal agencies, I don't think there's any dispute between the

parties that OSC's jurisdiction would extend beyond whistleblower complaints. The -- the only point of dispute is with respect to the FAA.

JUSTICE STEVENS: Mr. Stewart, let me just be sure I understand. In the Government's view, is it a personnel action or is it not?

MR. STEWART: No, it's not. And indeed, in footnote 28 of this Court's decision in Bush v. Lucas, the Court specifically identified warrantless searches as an example of conduct in which an employer might engage towards its employees that would not constitute a personnel action. And we think that's good authority for the proposition that an allegedly unconstitutional drug test is not a personnel action.

Now, if the employee had refused to take the test and been dismissed or disciplined, that would be a personnel action.

JUSTICE SCALIA: Well, I --

JUSTICE KENNEDY: In -- in those circuits which allow these cases to go to courts, has there been any indication that the courts are flooded with a number of these cases or --

MR. STEWART: Not -- no, not that I'm aware of. Obviously, in -- in other circuits, we prevailed on the -- the theory that the CSRA precludes review

even of constitutional claims.

And again, if I could return just for a moment to the -- the point I was making earlier about the grievance procedure. Congress has clearly manifested a preference for the inclusion of grievance procedures in collective bargaining agreements, and -- and given that express congressional preference, it doesn't seem right for this Court to assume that the grievance procedures won't work.

And this seems to be an ideal example of a case that potentially implicates constitutional issues but that still falls squarely within the expertise of the union, the arbitrator, and the FLRA. That is, the dispute here concerns whether, in fact, petitioner was tested more frequently than his colleagues, and if so, what was the explanation? Was it simply random deviations? Was it potentially a -- a glitch in the computer program that was used to generate a random list of names, or was there some invidious motivation as -- as petitioner has suggested? The resolution of those types of questions falls entirely within the expertise of the participants in the grievance process even though constitutional law per se is not what labor arbitrators are best at.

And so, I guess to -- to return for a second

to -- to Justice Scalia's question about why shouldn't the CSRA be read to preclude judicial review of constitutional claims altogether. I mean, we certainly think that if -- in a sense, that's -- that's a debate we would be happy to lose. That is, the Government has not suggested that we have an affirmative interest in preserving judicial review of those claims, and if the Court were looking for a -- the simplest solution to the problem, that solution would be -- have just as much to recommend it as petitioner's solution, which is that you go straight into Federal district court.

However, we don't think that Congress has spoken with the degree of clarity that this Court's decisions demand to preclude all judicial review of constitutional challenges, and we think the best way of reconciling that presumption of judicial review with the comprehensive nature of the CSRA scheme is to provide that claims -- constitutional claims are reviewable if, and only if, the plaintiff has made all reasonable efforts to utilize the available administrative remedies.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stewart.

Ms. Karlan, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF PAMELA S. KARLAN

ON BEHALF OF THE PETITIONER

MS. KARLAN: Mr. Chief Justice, and may it please the Court:

I -- I think it's clear at this point that the Government really is asking this Court to rewrite the CSRA on the fly. As late as page 48 of their brief on the merits, they wouldn't tell us whether our client should go to Federal district court or to the court of appeals. Then in response to Justice Scalia's question, they say, well, you could rewrite 2302(a)(2)(A)(xi) and (x). And I think the CSRA is a sufficiently detailed and comprehensive statute that this Court has resisted rewriting several times.

JUSTICE BREYER: But it's not rewriting. I mean -- I mean, it's perhaps.

MS. KARLAN: It is.

JUSTICE BREYER: All right. You think -- fine.

The -- the -- but the -- the issue it seems that could be dispositive of this, in respect to the non-constitutional claims -- and this is why I want to get your response -- is simply that it is a fair implication from Congress having set up on non-constitutional matters a system of arbitration to

require your client to go through that system before seeking to get review of the non-constitutional matters in a Federal district court. Now, that's the normal rule in administrative law. What is the argument that it wouldn't apply in your case?

MS. KARLAN: That the system of collective bargaining negotiated grievance processes here is set up in a way that does not filter it into judicial review. And therefore -- in 1994, when Congress amended section --

JUSTICE BREYER: Now you want us to hold you don't have judicial review --

MS. KARLAN: No, no.

JUSTICE BREYER: -- under the statute.

MS. KARLAN: No, Your Honor. We think that that goes straight under the APA.

Now, here's the real problem with the Government --

JUSTICE BREYER: No, but the answer -- please, I didn't mean to cut off your answer.

MS. KARLAN: I know.

JUSTICE BREYER: I want to hear your answer to the question that if I agree with you that on non-constitutional matters, if this system doesn't work for your client, he gets review in a Federal district

court. Suppose I agree with you on that. What is the argument against requiring him to exhaust the remedy that is there, namely a request for arbitration --

MS. KARLAN: The argument against it --

JUSTICE BREYER: -- as an implication from the statute?

MS. KARLAN: The argument against it in this case, which stems, from among other things, this Court's decision in Zipes against TWA and in Heckler against Day, is the Government waived any claim that our client should have been required to exhaust. They never raised that issue below, and this Court has repeatedly held that a failure to raise a non-exhaustion defense is waiver of that defense. You should wait until you have a case where there has been briefing and fact finding.

JUSTICE BREYER: All right. Now, is there any other claim -- any other answer to the argument other than they waived it?

MS. KARLAN: Yes.

JUSTICE BREYER: What?

MS. KARLAN: And that is that when Congress amended 7121(a) in 1994, they amended it to make clear that it had no effect on judicial causes of action that arose from elsewhere. That's what the insertion of the

word administrative there was done. It was not done in order to create an exhaustion regime, but rather, to eliminate a preclusion regime. And we set this out quite carefully in our brief, as do the two union amici, as to what the purpose of the grievance procedure is here. It is not to create an exhaustion regime and certainly not to create an exhaustion regime with what the Government, at least, concedes under the statute, as now written, is not a personnel action.

That is, the CSRA is quite comprehensive with regard to personnel actions, but it leaves to traditional sources of judicial enforcement things that are not personnel actions. And as this Court's opinion in Bush against Lucas makes absolutely clear, a warrantless search of the kind to which our client was subjected is not a personnel action and, therefore, is not within the comprehensive scheme of the CSRA for dealing with personnel actions.

Thank you.

JUSTICE BREYER: Did I -- could you give -- give the same answer --

MS. KARLAN: Absolutely.

JUSTICE BREYER: -- in respect to your constitutional claim? Why, given the presence of section 705 of the act --

MS. KARLAN: Well, we --

JUSTICE BREYER: -- one's -- forget it.

MS. KARLAN: Oh, oh.

JUSTICE BREYER: Your time is up. That's --

CHIEF JUSTICE ROBERTS: I get to say that. Your time is up.

(Laughter.)

CHIEF JUSTICE ROBERTS: Thank you.

MS. KARLAN: Thank you, both.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)